IN THE MISSOURI SUPREME COURT

BONZELLA SMITH, *et al*	)	
	)	
Respondents	)	
vs.	)	**No. SC92646**
	)	
TIF COMMISSIONERS, *et al.*,	)	
	)	
Appellants.	)	

Appeal from the Circuit Court of St. Louis City, Missouri
Case No. 0922-CC9379
Hon. Robert H. Dierker, Jr.
Division 18

SUBSTITUTE REPLY BRIEF AND BRIEF ON CROSS APPEAL OF APPELLANT NORTHSIDE REGENERATION, LLC (BONZELLA SMITH AND ISAIAH HAIR)

Paul J. Puricelli, #32801
Stone, Leyton & Gershman,
A Professional Corporation
7733 Forsyth Blvd., Suite 500
St. Louis, Missouri 63105
(314) 721-7011
(314) 721-8660
pjp@stoneleyton.com

Attorneys for Appellant Northside Regeneration, LLC

TABLE OF CONTENTS

REPLY BRIEF

BRIEF ON CROSS APPEAL

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REPLY BRIEF

ARGUMENT

(The Headings numerically follow those in Plaintiffs' Substitute Brief)

II. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES LACKED A REDEVELOPMENT PROJECT AND THEREFORE DID NOT SATISFY THE TIF ACT BECAUSE THE TRIAL COURT'S NEW DEFINITION OF A REDEVELOPMENT PROJECT AS "A SPECIFIC PLAN OR DESIGN" IS CONTRARY TO THE BROAD DEFINITION OF REDEVELOPMENT PROJECT UNDER, AND THE INTENT OF SECTION 99.805(14) OF THE TIF ACT IN THAT THE TIF ACT REQUIRES ONLY "ANY DEVELOPMENT PROJECT" AND THE REDEVELOPMENT ORDINANCES INCLUDED A REDEVELOPMENT PROJECT WITHIN THE MEANING OF THE TIF ACT.

Plaintiffs never cite, quote or refer to the statutory definition of "redevelopment project" in their discussion of whether one exists in the Northside ordinances. Plaintiffs do not offer any definition or description of what they believe the TIF Act means by "redevelopment project." Plaintiffs do not suggest how a phased, long-term, large scale redevelopment project ought to be documented. Plaintiffs do not even explicitly endorse the trial court's new "shovel ready" definition.

This is not mere sophistry. It is a very real, very practical dilemma for municipalities and their redevelopers. Plaintiffs argue that their motion in limine raised this issue at trial, but their ephemeral discussion of "phantoms," "trinities" and other goblins (*E.g.,* Supp. Appx. 28) offered (and offers) no meaningful guidance as to how a municipality might *satisfy* the TIF Act. What assurances would Plaintiffs want from a developer who plans to spend $8 billion over twenty years, more than $1 billion of which would be spent improving City streets, sewers, and sidewalks? That is why their motion to *exclude* evidence of a project, setting aside the place of such a motion in a bench trial, accomplished nothing. It was Plaintiff's burden to prove that the ordinances did not satisfy the TIF Act.

To this day, neither the parties nor this Court knows what Plaintiffs (or Intervenors) believe a redevelopment project of this magnitude must include. Would it be enough for Plaintiffs if, on day one, Northside proposed to rebuild a sewer or sewers within North St. Louis? Apparently not, because Plaintiffs argue that "redevelopment project" does *not* include public infrastructure work (P.Br. 23-24). Plaintiffs' conclusion is, of course, directly contrary to the trial court's opinion of what a project might be. The trial court ruled that Northside should have indicated, for example, that "sanitary sewers will be constructed in City Block 1000, commencing on such-and-such a date, at an estimated cost of so many dollars" (7/2 Ruling at 38, LF 348).

Setting aside for the moment whether it would be meaningful to the City's consideration of Northside's proposal to know that Northside would repair a sewer,

Plaintiffs' disavowal of even the trial court's definition leaves the parties and the Court in a quandary. How can the Court judge whether Northside or any other future redeveloper has come forward with "any development project" as §99.805(14) requires?

Plaintiffs seem to argue that a redeveloper cannot join a redevelopment plan and redevelopment project in a single document or series of documents. There is nothing in the TIF Act that precludes such an approach. To the contrary, the TIF Act contemplates that, in some instances, the redevelopment plan might itself constitute the "project." Section 99.805(15) defines "redevelopment project costs" to "include the sum total of all reasonable or necessary costs incurred or estimated to be incurred, and any such costs *incidental to a redevelopment plan or* redevelopment project, as applicable" (emphasis added).

Northside does not mean to suggest that *every* plan might constitute a project. The plan in *Shelbina* is a good example of one that did not. In *Shelbina,* the city created and approved its own redevelopment plan, complete with TIF financing, in the hope that the subsidized plan might "enable the City to select redevelopers to carry out the redevelopment program activities envisioned by the Plan." *City of Shelbina v. Shelby County,* 245 S.W.3d 249, 253 (Mo.App. E.D. 2008). The city "*assume[d] that multiple redevelopment projects will be undertaken* over the life of the Plan" and issued a request for proposals seeking a private redeveloper. *Id.* (emphasis in original). The City's plan explicitly "anticipated" the future identification of a redeveloper and redevelopment

projects. *Id.* The Court of Appeals ruled that the city's unrealized effort to attract redevelopment, without more, did not constitute a redevelopment project.

Northside does not quarrel with *Shelbina,* but certainly disagrees with Plaintiffs' (and Intervenors') position that it supports the trial court's ruling in this case. Northside submitted a detailed redevelopment plan identifying the scope and nature of planned redevelopment projects and contemplating the execution of a redevelopment agreement committing Northside to the performance of those projects. Among other things, the City's enabling ordinances committed Northside to start and completion dates, terms for the selection of subcontractors, procedures governing the preparation of construction plans, the implementation of sustainability features and safeguards to ensure that Northside would not receive TIF benefits until after Northside completed the infrastructure work (McIntosh Int. Ex. 3, ¶¶3.4, 3.6, 3.9 and 7.19; McIntosh Int. Ex. 4 at 16; A167, 168-169).

Plaintiffs do not say whether they agree that these over-arching deadlines and development parameters constitute a development project. Instead, Plaintiffs urge the Court to disregard the Redevelopment Agreement because it was not presented to the TIF Commission.

The argument is a red herring. Northside advised the TIF Commission that it intended to execute a Redevelopment Agreement with the City. In the Redevelopment Plan's discussion of "[s]ubsequent activities necessary to implement the Redevelopment Projects," Northside lists "the negotiation, approval, and execution of one or more

redevelopment agreements providing for the terms upon which the Developer and/or co-developers will under the Redevelopment Projects in accordance with this Redevelopment Plan" (McIntosh Int. Ex. 4 at 14). The Plan indicates what the redevelopment agreement(s) "shall provide" or "will include," including, without limitation, Northside's compliance with City ordinances, possible redevelopment by other developers and the potential interplay of TIF requirements between Northside and co-developers (McIntosh Int. Ex. 4 at 16). The Plan contemplated that the Aldermen would address TIF financing for co-Developers in an agreement or agreement(s) "entered into pursuant to legislation subsequently adopted by the Board of Aldermen" (McIntosh Int. Ex. 4 at 17).

Section 99.825 only requires revisiting the TIF Commission if, following the TIF Commission's hearing, changes are proposed that "substantially change the nature of the redevelopment project" (if proposed prior to the ordinance approving the project) or "changing the nature of the redevelopment project" (if proposed after the enabling ordinance). Under settled canons of statutory construction, "the express mention of one thing implies the exclusion of another." *Harrison v. MFA Mutual Ins. Co.*, 607 S.W.2d 137, 146 (Mo. 1980). The TIF Act does not, therefore, require revisiting the TIF Commission to approve contracts in furtherance of and consistent with a redevelopment plan. This would seem particularly so where the plan indicates a city's intention to sign redevelopment agreements and the TIF Commission elects to recommend approval without reviewing the contracts. Because the Redevelopment

Agreement does not *change* the "essential characteristics" or the "distinguishing qualities or properties of" the Plan, it was not necessary to revisit the TIF Commission. *Ste. Genevieve School Distr. R II v. Board of Aldermen*, 66 S.W.3d 6, 10-11 (Mo. 2002)(amendment that increased the cost 360% and changed "the entire focus" of the project required TIF Commission approval). *See also, Great Rivers Habitat Alliance v. City of St. Peters,* 2012 Mo.App. LEXIS 1054 at *48 (Mo.App. W.D. 2012)(amendment did not trigger §99.825 because it did not "alter the exterior boundaries of the Area, affect the general land uses, or change the nature of the land uses in the Plan").

In fact, *both* the Redevelopment Plan and the Redevelopment Agreement referred to "shovel ready" work that should have satisfied both the trial court and plaintiffs. The Redevelopment Plan stated:

> The initial redevelopment agreement shall provide that (a) during calendar year 2010, the Developer will identify any buildings that Developer proposes for demolition, and, if such demolition is approved by the City, to demolish such buildings; and (b) during calendar year 201, the Developer will use its best efforts to identify any buildings, which it owns and which in the [sic] Developer proposes for rehabilitation , and to rehabilitate such buildings no later than December 31, 2011.

(McIntosh Int. Ex. 4 at 16). The Redevelopment Agreement refined the requirement to require demolition prior to December 31, 2011 in addition to rehabilitation by December 31, 2012 (McIntosh Int. Ex. 3, ¶ 7.19, A183-184).[1]

Plaintiffs make derisive reference to Northside's use of tax credits under the Distressed Areas Land Assemblage Tax Credit Act, RSMo. §99.1205. That Act was designed to assist those willing to undertake the enormous risk of redeveloping large, historically disadvantaged areas. Northside's Redevelopment Plan disclosed its intention to seek land assemblage tax credits (McIntosh Int. Ex. 4 at 32), and the trial court admonished counsel that the propriety and use of those tax credits was not at issue (Tr. Tab III at 221-22).

The ordinances approved a redevelopment project by any standard, even without the benefit of the deference owed the City on all matters relating to urban redevelopment. More than a decade ago, the City's citizens, politicians and consultants joined forces and concluded that, absent the City's use of its economic development privileges, North St. Louis could not expect to attract the interest of private enterprise to

[1] The Redevelopment Plan contemplated significant demolition and rehabilitation of existing structures (*E.g.,* McIntosh Ex. 4 at 13, 14; A 270, 271). The cost-benefit analysis identified demolition and abatement costs of $32,082,549 and building rehabilitation costs of $299,400,000 (McIntosh Int. Ex. 8 at Appendix B).

undertake the daunting task of rebuilding its decayed infrastructure.[2] The trial court's decision to create a new definition of "project" without regard to the language and purpose of the TIF Act and detached from the commercial reality of large scale redevelopment is a dangerous, unnecessary and strident attack on municipalities' longstanding discretion to contract for subsidized redevelopment on terms that the municipality believes are best for its citizens.

[2] *See* A Plan for the Neighborhoods of the 5th Ward c. 2000 ("5th Ward Plan")(McIntosh Int. Ex. 10; A337).

III. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES DID NOT SATISFY THE TIF ACT BECAUSE THE ORDINANCES LACKED A COST-BENEFIT ANALYSIS REFERABLE TO A SPECIFIC PROJECT BECAUSE THE TIF ACT DOES NOT REQUIRE A COST BENEFIT ANALYSIS IN CONNECTION WITH INDIVIDUAL REDEVELOPMENT PROJECTS; RATHER, RSMo §99.810.1(5) REQUIRES A COST-BENEFIT ANALYSIS OF THE REDEVELOPMENT PLAN AS A WHOLE AND THE REDEVELOPMENT ORDINANCES SATISFIED THE TIF ACT IN THAT THEY INCLUDED A COST BENEFIT ANALYSIS OF THE PLAN AS A WHOLE.

Plaintiffs' argument in this section is difficult to follow. Much of Plaintiffs' argument is a rehash of their position that the TIF Act requires a redevelopment project prior to the adoption of TIF financing, again without any indication whatsoever of what the project should include or how the project should be described or documented. Those arguments do not address what the legislature meant by its use of the word "project" in §99.810.1(5).

Plaintiffs appear to argue that the TIF Act requires a cost-benefit analysis of every discrete redevelopment project in furtherance of a redevelopment plan, accusing Northside of a "total lack of understanding [sic] the statutory language" (P.Br. 30). Respectfully, it is Plaintiffs who do not understand the TIF Act.

Section 99.810.1(5), provides the requirements for redevelopment *plans* in full as follows:

> ....No *redevelopment plan* shall be adopted by a municipality without findings that:
>
> * * *
>
> (5) A cost-benefit analysis showing the economic impact *of the plan* on each taxing district which is at least partially within the boundaries of the redevelopment area. The analysis shall show the impact on the economy if the *project* is not built, and is built pursuant to the redevelopment plan under consideration. The cost-benefit analysis shall include a fiscal impact study on every affected political subdivision, and sufficient information from the developer for the commission established in section 99.820 to evaluate whether the *project* as proposed is financially feasible;

RSMo § 99.810.1(5)(emphasis added).

The legislature could not have intended the word "project" to mean a "redevelopment" project because municipalities are free to adopt redevelopment plans without a corresponding redevelopment project: "No redevelopment project shall be

approved unless a redevelopment plan has been approved and a redevelopment area has been designated *prior to or* concurrently with the approval of such redevelopment project. RSMo §99.820.1 (emphasis added). Section 99.825.1 also contemplates the approval of redevelopment plans prior to the approval of redevelopment projects and requires a public hearing "[p]rior to the adoption of an ordinance proposing the designation of a redevelopment area, or approving a redevelopment plan *or* redevelopment project…." (emphasis added). The redeveloper need only present a "redevelopment project" when it applies for TIF financing under the plan and there is no statutory requirement that the redeveloper re-submit or submit a cost-benefit analysis at that time. RSMo §99.845.

The cost benefit analysis serves as a planning tool for the municipality, designed to assist the municipality's assessment of whether the planned redevelopment will generate incremental tax revenues (the "benefit") that exceed the commitment of a portion of those revenues to repay reimbursable infrastructure project costs (the "cost")(Tr. Tab 3 at 219-20; Tr. Tab 4, 82-83, 101-3). That analysis is only meaningful in the macro sense of the entire project (which is the analysis that Northside provided), because it is the totality of the costs and benefits that are and should be of concern to a municipality.

The legislature made specific reference to "redevelopment" projects when discussing other requirements of redevelopment plans in the same statute. *See, e.g.*, § 99.810.1(1), (3). The use of the word "project" can only refer to the overall project

proposed under the plan (whether or not more specific *redevelopment* projects are identified). In fact, RSMo § 99.805(15) defines "redevelopment project costs" to "include the sum total of all reasonable or necessary costs incurred or estimated to be incurred, and any such costs *incidental to a redevelopment plan or* redevelopment project, as applicable" (emphasis added).

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DENYING NORTHSIDE'S MOTION FOR A NEW TRIAL BECAUSE, EVEN ASSUMING THE TRIAL COURT'S NEW DEFINITION OF "REDEVELOPMENT PROJECT" AND ASSUMING THE REDEVELOPMENT ORDINANCES DID NOT OTHERWISE CONTAIN A REDEVELOPMENT PROJECT, THE COURT SHOULD HAVE ALLOWED NORTHSIDE TO PRESENT EVIDENCE OF REDEVELOPMENT PROJECTS APPROVED BY THE CITY BOARD OF ALDERMEN IN THAT THE COURT IS ALLOWED TO CONSIDER MATTERS OUTSIDE THE ORDINANCES AND SUCH EVIDENCE WOULD HAVE DEMONSTRATED THAT THE CITY APPROVED A VIABLE REDEVELOPMENT PROJECT EVEN UNDER THE TRIAL COURT'S DEFINITION.

Plaintiffs misstate Northside's position and then attack the position as recast by them. To clarify, Northside does not believe that a redeveloper need not identify a redevelopment project at the time it applies for TIF financing (P.Br. 36). *See* RSMo §99.845.1. Simply stated, the Redevelopment Ordinances identified a redevelopment project that satisfied the TIF Act and, although the trial court was wrong to re-define "redevelopment project", the Redevelopment Agreement identified a project that satisfied the trial court's interpretation, too.

The trial court abused its discretion when it denied Northside motion for a new trial to address an issue "detected by the Court" (7/2 Ruling at 47).

V. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES WERE VOID IN THE ABSENCE OF A REDEVELOPMENT PROJECT BECAUSE, EVEN IF THE COURT ADOPTS THE TRIAL COURT'S OVERLY RESTRICTIVE DEFINITION OF REDEVELOPMENT PROJECT, THE ORDINANCES APPROVED A REDEVELOPMENT PROJECT

Plaintiffs complain that they "cannot find one sentence" identifying infrastructure development work within Northside's Redevelopment Plan.[3] Plaintiffs did not read very far into the Plan. The Plan includes entire sections on new streets (McIntosh Int. Ex. 4 at 25), improvements to existing streets (*Id.*), and a sewer and energy plan (*Id.,* at 26). As previously indicated, the Redevelopment Plan also acknowledged that:

> The initial redevelopment agreement shall provide that (a) during calendar year 2010, the Developer will identify any buildings that Developer proposes for demolition, and, if such demolition is approved by the City, to demolish such buildings; and (b) during

[3] Plaintiffs state that the parties agree that the totality of the approved redevelopment project must be included in Northside's Redevelopment Plan (P.Br. 42). That is not the case. The parties do agree, however, that the City must approve a redevelopment project prior to adopting TIF financing.

> calendar year 201, the Developer will use its best efforts to identify any buildings, which it owns and which in the [sic] Developer proposes for rehabilitation , and to rehabilitate such buildings no later than December 31, 2011.

(McIntosh Int. Ex. 4 at 16). The Ordinances approved a redevelopment project.

BRIEF ON CROSS-APPEAL

This response is made subject to Northside's Motion to Dismiss Plaintiffs' cross-appeal.

VI. WHETHER THE REDEVELOPMENT PLAN'S EVIDENCE OF COMMITMENTS TO FINANCE PROJECT COSTS REPRESENTS "EVIDENCE OF FINANCING" PURSUANT TO §99.810.1 RSMO

Section 99.810.1 contains two discrete categories. First, it provides that a redevelopment plan "shall include…evidence of the commitments to finance the project costs," among other things. Second, it provides that a municipality cannot approve a redevelopment plan without certain findings, which do not include any condition relating to financing commitments. Northside has not located any case law addressing the significance of the two clauses, but the duality of the statute appears purposeful. The first clause, the list of items "to be included," serves as a checklist to ensure uniformity of submissions and to ensure that plans submitted to the TIF Commission have a minimum level of information to guide its review before the Commission makes its

recommendation to the Board. The checklist would also serve as a statutory basis for the Commission—and, thereafter, the Board—to request additional information from the applicant if the circumstances of the proposed redevelopment and submission so warranted. The separate clauses suggest that the legislature accorded less significance to the checklist than the explicit preconditions found in the second sentence.

As the trial court indicated, "[t]he statute does not demand any level of detail" regarding financing commitments (7/2 Ruling at 26; LF 336). The Courts have followed suit. The first case to deal with the sufficiency of financing was *Parking Systems, Inc. v. Kansas City,* 518 S.W.2d 11 (Mo. 1974), in which the Supreme Court addressed the sufficiency of a plan approved under a Kansas City ordinance requiring "*a determination by the City Council* that 'sufficient funds or securities are immediately available and will be used for normal financing of the entire development.'" *Id.,* at 16 (emphasis added). Much the same as here, the challenging party complained that:

> (a) The only entity to furnish funds was the Redevelopment Corporation, a "shell" corporation with a deficit; (b) The Redevelopment Corporation is excused from performance in the event it cannot obtain financing satisfactory to it; (c) No person or entity other than the Redevelopment Corporation was committed to furnish funds except Durwood, Inc. which was to furnish $434,000 for the cost of

> demolition; (d) The City relied on letters from banks addressed to Stanley Durwood, Durwood, Inc., indicating that the banks would make loans if "adequate collateral" was furnished, but the City made no investigation as to what constituted adequate collateral; (e) The only letter concerning availability of funds for construction of improvements was "from Fred Brady to Stanley Durwood, President of Durwood, Inc., indicating that many of their institutional investors would be interested in lending money," and the City "did not regard this as a commitment;" and (f) Durwood, Inc. was "not in a financial condition to furnish funds or collateral to finance the demolition and funds which, when added to the land in the project area, would be sufficient to borrow additional funds to finance even the cost of acquisition of the property in the project area."

Id., at 17.

The Supreme Court held that, even under the stringent language of the ordinance, the redeveloper need not prove that it has "the required amount of money in the bank, or a sufficient amount of securities in hand." *Id.,* at 19. The Supreme Court

held that the sufficiency of the financing was at least debatable, citing the following testimony that parallels the evidence in this case:

> A. The requirements that the Council made over and above the requirements of the statute were that we be satisfied that the applicant at least had the ability to acquire the land and clear the blight in question and that could have been, that information could have been supplied a number of different ways. I suppose if they had a pile of money on the table that would have satisfied me. In this case letters of commitments and other evidence was supplied that eventually was satisfactory.
>
> Q. There never was any evidence submitted that they had the cash on hand, available to acquire the land and clear the blight?
>
> A. No, I think not.
>
> Q. So, in fairness when you get down to it, in this particular case, it was the letters from the banks, was it not that calmed any doubts that you had?
>
> A. No, it was a combination of what was presented * * * which included letters from banks. It included

> appraisals of the relative value of the land and the cost to clear the blight therefrom and it included what amounted to some live testimony at hearings before the Committee and eventually one hearing before the City Council and as I [said] in all honesty it was a combination of all those items that finally convinced me that this applicant did meet the test as required by the ordinance.

Id., at 21-22.

Plaintiffs rely principally upon the Eastern District's opinion in *Maryland Plaza Redev. Corp. v. Greenberg,* 594 S.W.2d 284 (Mo.App. E.D. 1979). In *Maryland Plaza,* against an ordinance requiring a detailed statement of the proposed method of financing, the redeveloper refused to identify its lending sources and submitted a plan supported by its bare representation that "[a]t the present time it is contemplated that debt financing will be on a structure-to-structure basis." *Maryland Plaza,* 594 S.W.2d at 289. The court contrasted its situation with *Parking Systems*, and the testimony quoted above. The Eastern District has questioned the reach of *Maryland Plaza* in its later decisions.

In *Devanssay v. McGuire,* 622 S.W.2d 323, 327 (Mo.App. E.D. 1981), the Eastern District stated that "[w]e do not read *Maryland Plaza* to impose any particular requirements on the statement of financing or to hold that the validity of the Board's action can be determined only from the information contained in the financing section of

the plan or only from the body of the plan itself." The Court found it could "presume a certain expertise in the … Board of Aldermen of the potential of financing in the City of St. Louis and through governmental agencies." *Id.*, at 328. *See also, Tierney v. The Planned Ind. Expansion Auth. of Kansas City,* 742 S.W.2d 146, 153 (Mo. 1987)("The holding [in *Maryland Plaza*] has perhaps been somewhat qualified in [*Devanssay*], which appears to relax the requirements for detailed financial information, and holds that the legislative body's conclusion that adequate information has been furnished is entitled to substantial weight").

While Plaintiffs are highly critical of Northside's Plan, they never say what the evidence of financing commitments *should contain* in the context of a large scale, phased redevelopment. As the City TIF Commission Chairman explained, the TIF Commission expects that the reported financing commitments will be tailored to the commercial reality of the redevelopment proposal:

> There are two different kinds of TIF applications and proposals that we look at. One kind is for the development of a specific building or maybe a couple of buildings together, and there you have a developer who you can talk about, who his contractor is, and get a lot of detail.
>
> In other TIF proposals, we deal with a region or a broader area than just a building. For example, in the

– what do we call it, the Grand Center. I guess we call it the Grand Center. That is a regional TIF and it was adopted several years ago, as opposed to a single building.

* * *

The choice – I mean, I think it's three or four years ago, we did the Grand Center. Just recently, they …finished a building and that all gets the TIF financing, and there are other buildings in Grand Center that aren't done yet, and we understand under those circumstances that what you can say about the financing is less definite that what you can say when it's a given building and somebody is giving a definite amount or a definite lending and financing plan.

(10/29/09 Tr. 108-9).

In the regional context, the Chairman explained, the TIF Commission does not expect to see a firm commitment:

No TIF project ever has a firm commitment in the sense of a bank commitment, and the reason for that is that the financial institutions are sitting on the side and they're not going to make a commitment until

> they know what other incentives are in place so that they understand what the value is, so what we do is that we say – we make certain assessments about what the financing is going to be.
>
> We approve the TIF for a maximum amount against that overall view of the project, but what ultimately resolves what the amount of the TIF is comes several steps down the process….

Id., at 110-11.

The Northside plan contemplates the redevelopment of 1500 acres over a 23 year period at a total cost exceeding $8 billion (A264, 276-84). Every witness asked agreed that it would not be commercially reasonable to expect *any* lending institution to issue a firm commitment, on day one, to lend $8 billion toward the redevelopment project—not because the project was not feasible, but because no one could predict the evolution of economic conditions or the redevelopment plan over its 23 year life (10/29 Tr. at 145-46, 159-60 (Griffin) and 110-11 (Newburger); Tr. Tab III 104 (Eckelkamp); Tr. Tab IV 312 (Caplin); Tr. Tab I 74-75 (Boldrin)). Alderwoman Griffin testified:

> This, we understood from the very beginning, the plan says it's a twenty-three-year plan and it's proposed in phases, so we weren't looking for—you can't show us

> the day you're going to have financing, whether you need financing for the whole thing, plus you have to be creative, especially in today's market, with the way you get projects financed anyway, and we know that from some of our other projects so it was—we were looking to make sure that they were leveraging everything, including from the City, from the State, any stimulus money that they might be receiving, you know, any equity that they had in terms of their property.[4]

(10/29/09 Tr. 160 (Griffin)). *Accord, Devanssay v. McGuire,* 622 S.W.2d 323, 327 (Mo.App. E.D. 1981)("in this economic period it would be nearly impossible to delineate with particularity the precise sources of financing").

The Redevelopment Plan references various sources of financing for phases A-D:

> Appendix B contains a commitment letter from the Bank of Washington to provide financing for RPA A and RPA B. Said commitment letter will be

[4] Alderperson Griffin also reviewed feasibility and market studies well beyond those typically submitted in connection with TIF applications, which indicated a superior level of investment and commitment. *Id.,* at 159.

> supplemented when subsequent Redevelopment Projects are approved. The Developer also commits to finance Redevelopment Projects Costs through a combination of equity, conventional financing, and TIF Obligations that would be purchased or privately placed by the Developer.

(McIntosh Int. Ex. 4 at 32; A289). The Plan also references various tax credit programs as sources of funds. *Id.*

Appendix B to the Redevelopment Plan contained a letter from the Bank of Washington committing to finance RPA A and B provided the Board approved TIF financing (McIntosh Int. Ex. 8, Appendix B, Intervenors' A217). The Bank's letter, and its stated condition of TIF financing, is typical of those submitted in connection with TIF applications in the City (10/29/09 Tr. 110, 115). However, the Bank's letter was different from most in one important respect—it followed an *existing* loan of nearly $30,000,000 (10/29/09 Tr. 116, 160-61). The Bank's Executive Vice President testified that his letter was far more than an "empty promise," as characterized by Plaintiffs:

> Q: (by Mr. Amon) The letter that you provided for this particular redevelopment plan, is this a firm commitment?

A: I think that it's a firm commitment from the perspective that we were already $28 million into the deal.

Q: And that's what that refers to?

A: No. It's a reiteration of our commitment and, again, as I said before, we continued to finance since we wrote this letter. There's been loan pay-offs and we've continued to make additional loans. I made a loan two weeks ago in this.

(Tr. Tab III 106). The Bank's involvement followed the historical (and anticipated future) incremental investment by the developer and its lender. *Id.*, at 98-99. *See also,* Tr. Tab IV 312 (Caplin).

The City also looked beyond the Bank's letter and the representations contained in the Redevelopment Plan. Both the Commission and the Board considered Paul McKee's existing investment in the redevelopment area as further evidence of the financing commitments, described by the TIF Commission Chairman as "a considerable equity bundle and much more that we would ordinarily see" (10/29/09 Tr. 116; *see also* 10/29/09 Tr. 158-59 (Griffin testimony)).

The discretion afforded the Board would mean little if the Board could not assess the adequacy of the financing commitments in context of the plan's scope and

duration. While it might be reasonable to expect something approaching a firm, all-encompassing commitment to finance the redevelopment of a single building, it is not commercially reasonable to expect any financial institution to commit to a 23 year, $8 billion loan covering the redevelopment of 1500 acres. It is, at the least, fairly debatable that Northside's plan demonstrated the necessary evidence of financing commitments.

VII. THE COURT SHOULD CONSIDER THE REDEVELOPMENT AGREEMENT IN CONNECTION WITH ITS DETERMINATION OF WHETHER NORTHSIDE PROPOSED A REDEVELOPMENT PROJECT

Northside addresses this argument, *supra,* in section II of its Reply.

VIII. WHETHER THE REDEVELOPMENT PLAN CONTAINS A FINDING THAT IT CONFORMS TO THE CITY'S COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF THE MUNICIPALITY AS A WHOLE PURSUANT TO §99.810.1(2) RSMO

Section 99.810.1(2) requires the Board to find that "[t]he redevelopment plan conforms to the comprehensive plan for the development of the municipality as a whole." Conforms means "to be in agreement or harmony." *City of St. Charles v. Devault Management,* 959 S.W.2d 815, 824 (Mo.App. E.D. 1997)

Chapter 99 does not define "comprehensive plan." The Missouri courts generally refer to Chapter 89, which governs city planning commissions. Section 89.340 authorizes the City Planning Commission to adopt a city plan:

> The commission shall make and adopt a city plan for the physical development of the municipality. The city plan, with the accompanying maps, plats, charts and descriptive and explanatory matter, ***shall show the commission's recommendations for the physical development and uses of land***, and ***may***

> ***include***, among other things, the general location, character and extent of streets and other public ways, grounds, places and spaces; the general location and extent of public utilities and terminals, whether publicly or privately owned, the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment or change of use of any of the foregoing; the general character, extent and layout of the replanning of blighted districts and slum areas. (emphasis added)

Section 89.360 acknowledges that the plan should and will evolve with the changing demands of the municipality: "The commission may adopt the plan as a whole by a single resolution, or, as the work of making the whole city plan progresses, may from time to time adopt a part or parts thereof, any part to correspond generally with one or more of the functional subdivisions of the subject matter of the plan." A city's comprehensive plan need not be a single document. *State ex rel. Westside Development Co., Inc. v. Crist,* 935 S.W.2d 634, 640 (Mo.App. W.D. 1994).

For planning purposes, the planning commission may build flexibility into the plan using terms such as "flexible guideline" and the like, and the Court will honor the commission's directive. *City of St. Charles v. Devault Management,* 959 S.W.2d 815,

823 (Mo.App. E.D. 1997), citing *Treme v. City of St. Louis,* 609 S.W.2d 706 (Mo.App. E.D. 1980).

The City adopted a comprehensive plan in 1947. Mayor Slay recognized that the plan was out-dated and commissioned a community development block grant for the creation of a modern land use plan (Tr. Tab IV 252). As a result of that effort, on January 5, 2005, the City Planning Commission adopted a Strategic Land Use Plan for the City of St. Louis (D.Ex. K; Tr. Tab IV 252). In its preamble, the Strategic Land Use Plan stated:

> In 1947, more than fifty years ago, the City of St. Louis adopted a land use plan. The City has been living with this out dated land use plan ever since. Now, the City's Planning and Urban Design Agency is proposing a ***new land use plan.***
>
> * * *
>
> Adopted by the City's Planning Commission on January 5, 2005, this straightforward Land Use Plan ***will become the basis for additional planning and development initiatives*** involving collaboration between elected officials, City departments, neighborhood residents and developers, to overlay

> more fine-grained visions of the broader framework
>
> presented by this Plan. (emphasis added)

The Strategic Land Use Plan indicated that prior neighborhood plans, like the 5th Ward Plan, "have been taken into account in preparing this broader-level Land Use Plan." The Strategic Land Use Plan provides: "This Plan, like the City itself, is not a static object. Rather, it is intended to provide a foundation and a roadmap for positive change."

Since its adoption, the City has referred to the Strategic Land Use Plan in connection with TIF and other redevelopment projects (Tr. Tab II 19, 68; Tr. Tab III 18-19, 206, 207; Tr. Tab IV 252, 254).

The Redevelopment Plan provides that it conforms to the Strategic Land Use Plan, as does the Board's enabling ordinance (McIntosh Ex. 4 at 10; McIntosh Ex. 1 at 3). Plaintiffs argue that some other language or finding was necessary, apparently suggesting that the City or Northside had to lay out the details of its comparison between Northside's plan and the Strategic Land Use Plan. There is no such requirement in the statute. The Redevelopment Plan contains a description of its projects and a land use plan that, in fact, are in agreement and harmony with the flexible guidelines of the Strategic Land Use Plan (McIntosh Ex. 4 at 20; Tr. Tab IV 68-69). Plaintiffs do not argue to the contrary and, in any event, any deviations are properly reserved for the municipality's discretion:

> We find no disabling disharmony between the 1978 plan and the uses proposed in 1982. Under the city's zoning ordinances "commercial" zoning is "higher" than light industrial zoning, and the classifications are cumulative, so that commercial uses are permissible in a light industrial area. *Planning is a continuing process, and a plan cannot remain static or inviolate.* The City Plan Commission and the City Council are charged with the responsibility for comparing the PIEA proposal to the preexisting plans and determining whether there is substantial compliance. To the extent that there are differences, we must assume that the duly constituted authorities concluded that the preexisting plans should be modified. The owners would introduce inflexibility and invite close judicial scrutiny, in a way not contemplated by the governing legislation.

Tierney v. Planned Ind. Exp. Auth., 742 S.W.2d 146, 152-53 (Mo. 1987)(construing a similar requirement under the Planned Industrial Expansion Act).

The Redevelopment Plan satisfies RSMo §99.810.1(2).

IX. WHETHER THE TIF COMMISSION WAS UNDER ANY OTHER OBLIGATION TO DENY THE PLAN FOR LACKING CONFORMITY WITH §99.800 ET. SEQ. RSMO

As set forth in Northside's motion to dismiss, Plaintiffs' Point Relied On VIII fails to conform to Rule 84.04(d) and provides no indication as to what aspect or portion of the trial court's ruling Plaintiffs challenge. The rambling discussion that follows the Point Relied On often refers to evidence adduced at trial without citation to the record, and does not identify a single trial court ruling in the eight page discussion. Northside is left to guess where Plaintiffs feel the trial court erred.

Subsections a and b appear to challenge the cost-benefit analysis that accompanied the Redevelopment Plan, but it is not clear where, if at all, Plaintiffs contend the trial court erred in its analysis of the cost-benefit analysis.

Plaintiffs take issue with Northside's projections attached to the Cost Benefit Analysis as Addendum B, which were prepared by Russell Caplin. Mr. Caplin laid out the bases for his assumptions and that testimony stands as the only, substantial, uncontroverted evidence on the issue (*See* Tr. Tab IV at 292-325). Although Plaintiffs apparently question the projected growth and absorption rates, they did not present any alternative assumptions or any authoritative materials undermining Caplin's analysis or approach. Even if they had, that likely would not have been enough to overcome the substantial deference due the City:

> We acknowledge Plaintiffs' argument that the statements made by City's experts were mere conclusions and not supported by substantial evidence. Independently reviewing the record, we find, however, that the experts provided bases for their opinions and that each had experience in the field of urban planning and redevelopment.
>
> After fully and independently considering all of the evidence and being mindful of our standard of review, it is evident that the but-for test was an issue upon which the experts had differing opinions. To the extent this was a debatable issue upon which Board decided the test was satisfied, this court cannot substitute its judgment for that of Board. Plaintiffs have failed to establish that the decision was arbitrary or induced by fraud, collusion or bad faith. Point two is denied.

JG St. Louis West v. City of Des Peres and West County Center, LLC, 41 S.W.3d 513, 521 (Mo.App. E.D. 2001).

Plaintiffs argue that Northside's projections rely upon a return on cost analysis, which Plaintiffs find to be illegitimate. First, the projections also allow for a

calculation of the return on equity (Tr. Tab IV 298, 311). Further, irrespective of counsel's opinion, return on cost is an accepted presentation in the development community and constitutes an important check on the reasonableness of the value and cost projections (Tr. Tab IV 274-5, 294). This analysis compares the ultimate costs with the predicted values over the life of the project. *Id.* The hope in any development project is, obviously, that value will exceed costs (Tr. Tab IV 274). However, a gross difference might suggest that estimates of one or the other are off base (Tr. Tab IV 287). Here, without TIF financing, values only marginally exceed costs which demonstrates that the predicted growth rates are, if anything, conservative (Tr. Tab IV 274, 287).

Plaintiffs also raise a question relating to the sources of funds to pay costs (P.Br. 71). Section 99.810.1 provides that a redevelopment plan must include "the anticipated sources of funds to pay the costs." Like the financing commitment requirement, §99.810.1 does not make the delineation of sources of funds a precondition to the Board's approval of a plan. While Plaintiffs' counsel and Professor Boldrin apparently disagree, the fact remains that the Redevelopment Plan describes the sources of funds (McIntosh Int. .Ex.4 at 32; A289).

Plaintiffs' discussion under "A $390.6 million dollar splice" (P.Br. 72) and "extended boundaries or extended authority" (P. Br. 72) is particularly obtuse and, again, without any reference to the Court's 7/2 Ruling. As to the latter, Plaintiffs appear to be confusing the activation of certain phases of the redevelopment for purposes of TIF financing with the approval of redevelopment areas.

By way of background, the TIF Commission recommended adoption of an ordinance adopting the Redevelopment Plan and Redevelopment Area proposed by Northside (Ordinance 68484, A28). Northside planned for phased redevelopment in four redevelopment project areas which were co-extensive with the overall Redevelopment Area, called Redevelopment Project Areas (RPA) A-D (McIntosh Int. Ex. 4 at 19-23, A276-280). The TIF Commission recommended that the Aldermen adopt TIF financing with respect to RPA A and B only (A28, 31), reserving the right to activate TIF financing within RPA C and D, which were generally anticipated to develop later in the project. The Redevelopment Ordinances tracked the TIF Commission's recommendations, approving the Plan, overall Area and Agreement, but reserving approval of TIF financing within RPA C and D for a later date (*See* Ordinance 68484, A28 et seq.).

Section 99.805(12) of the TIF Act defines a redevelopment area as follows:

> (12) "Redevelopment area", an area designated by a municipality, in respect to which the municipality has made a finding that there exist conditions which cause the area to be classified as a blighted area, a conservation area, an economic development area, an enterprise zone pursuant to sections 135.200 to 135.256, RSMo, or a combination thereof, which area includes only those parcels of real property directly

> and substantially benefited by the ***proposed*** redevelopment project…(emphasis added)

The Act contemplates that a municipality may approve TIF financing for various redevelopment projects at various points in time after the redevelopment area is defined. First, the Act does not define "redevelopment project" to include only those projects submitted for TIF financing:

> (14) "Redevelopment project", *any* development project *within a redevelopment area* in furtherance of the objectives of the redevelopment plan; any such redevelopment project shall include a legal description of *the area selected* for the redevelopment project (emphasis added)

"Any" project satisfies the definition and, depending upon the "area selected" for the project, a redevelopment project may encompass some or all of the redevelopment area.

Consistent with that definition, the TIF Act provides for the subdivision and phasing of discrete projects within a redevelopment project area. For example, in §99.805(13), the Act acknowledges that a "redevelopment plan" will "[qualify] the redevelopment area as a blighted area," and, in §99.810.1(3), allows the Board to approve redevelopment projects for ten years after it approves the plan: "[N]o ordinance approving a redevelopment project shall be adopted later than ten years from the adoption of the ordinance approving the redevelopment plan under which such project is

authorized…." Section 99.820.1(1) acknowledges the possibility of sequential approval and, more important, expressly authorizes the Board to approve projects *after* it establishes the redevelopment area:

> (1) By ordinance introduced in the governing body of the municipality within fourteen to ninety days from the completion of the hearing required in section 99.825, approve redevelopment plans and redevelopment projects, and designate redevelopment project areas pursuant to the notice and hearing requirements of sections 99.800 to 99.865. **No redevelopment project shall be approved unless a redevelopment plan has been approved and a redevelopment area has been designated prior to or concurrently with the approval of such redevelopment project** and the area selected for the redevelopment project shall include only those parcels of real property and improvements thereon directly and substantially benefited by the proposed redevelopment project improvements; (emphasis added)

The TIF Act specifically contemplates the phased activation of TIF financing for redevelopment projects within an approved redevelopment area.

X. WHETHER THE BOARD OF ALDERMEN CREATED AN ORDINANCE SUBJECT TO TIF COMMISSION APPROVAL

Like Point Relied On IX, neither Point Relied On X nor the discussion that follows cites to any language or holding of the trial court, whether in the 7/2 Ruling or otherwise. Northside is again left to guess what Plaintiffs seek to appeal from. Like the previous section, Plaintiffs seem to be challenging the phased implementation of redevelopment projects, and TIF financing for those projects within a redevelopment area. To the extent that is the case, Northside refers the Court to its discussion under Point Relied On IX.

XI. WHETHER ATTORNEYS' FEES ARE APPLICABLE UPON A RULING FAVORABLE TO PLAINTIFFS

Plaintiffs' reference to the Declaration of Independence and the 1967 civil rights riots notwithstanding, Plaintiffs do not offer any legal basis to reverse the trial court's denial of attorneys' fees based upon the "American Rule." *Liberty v. Beard*, 636 S.W.2d 330, 331 (Mo. 1982)("The rule in Missouri is that absent statutory authorization or contractual agreement, each litigant, with few exceptions, must bear the expense of his own attorneys' fees (American Rule)")

The Court should affirm the trial court's denial of Plaintiffs' request for fees and costs.

CONCLUSION

Northside requests that the Court reverse the trial court because the Redevelopment Ordinances satisfied the TIF Act in their original form or with the addition of the Project Agreement.

Respectfully submitted,

STONE, LEYTON & GERSHMAN,
A Professional Corporation

By: s/s Paul J. Puricelli
Paul J. Puricelli #32801
7733 Forsyth Boulevard, Suite 500
St. Louis, MO 63105
314/721-7011 (telephone)
314/721-8660 (telecopy)
pjp@stoneleyton.com

Attorneys for Northside Regeneration, LLC

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that, the foregoing Substitute Reply Brief And Brief On Cross Appeal Of Appellant Northside Regeneration, LLC (Bonzella Smith And Isaiah Hair) complies with the requirement of Rule 84.06 b(2) and Local Rule 365. This brief contains total 7,458 words (4,672 in the Reply portion and 2,786 in the Response portion) as determined by the software application for Microsoft Word.

The foregoing was served that on the 17th day of September, 2012 via the Court's ECF system to the following:

D.B. Amon #31287
3201 Washington Ave.
St. Louis, MO 63103

W. Bevis Schock #32551
7777 Bonhomme, Suite 1300
St. Louis, MO 63105

Daniel B. Emerson #56808
Assistant City Counselor
City Hall, Room 314
1200 Market Street
St. Louis, MO 63103

James W. Schottel, Jr. #51285
906 Olive, Suite PH
St. Louis, MO 63101

Eric E. Vickers #31784
7800 Forsyth, Suite 700
St. Louis, MO 63105

/s/ Paul J. Puricelli